ciary, to whom was referred Senate bill, No. 228, "An Act to amend an act to organize the courts of justices of the peace and county courts, and define their jurisdiction and duties," approved thirteenth August, A. D. 1870, ask leave to return the same and recommend that it do not pass; also, your Judiciary Committee, to whom was referred Senate bill, No. 229, "An Act concerning notaries public," ask leave to return the same and recommend its passage; also, your Committee on Judiciary, to whom was referred Senate bill, No. 248, beg leave to report the same back with a substitute; and recommend the passage of the substitute; also, the Judiciary Committee, to whom was referred the memorial of the citizens of Bell county, asking relief for the sheriff of that county from liabilities for loss of public moneys, beg leave to report the same back, with the remark that the fortieth section of Article 12, of the Constitution, as amended, absolutely prohibits this relief. The committee is satisfied that this is a meritorious case, but that it finds its hands tied, and from which there is no escape.

The Senate then proceeded to the Hall of the House of Representatives in joint session to hear the argument of counsel in the Cooper case.

IN JOINT SESSION.

On notice of Colonel Word, leave granted the respondent for explanatory remarks, at close of which Colonel Word then argued the case in behalf of Judge Cooper. Then came Mr. D. H. Nunn in behalf of the State. During his argument, Representative Smith, of Grimes, moved the House adjourn. Carried; and on motion of Senator Ireland, the Senate retired to Senate chamber.

IN SENATE.

On motion of Senator Bradshaw, Senate adjourned.

FIFTY-NINTH DAY.

SENATE CHAMBER,
Austin, March 25, 1874.

Senate met pursuant to adjournment. Roll called; quorum present.

Prayer by the chaplain.

Journal of yesterday read and adopted.

On motion of Senator Stirman, Senator Allison was excused for to-day, on account of sickness.

Senator Joseph was added to the following committees: Judiciary, Internal Improvements, Education and Constitutional Amendments.

Senator Burton was added to the Committee on Roads, Bridges and Ferries.

Senator Dillard, chairman Committee on Privileges and Elections, submitted the following report:

COMMITTEE ROOM,
Austin, Texas, March 24, 1874.

Hon. R. B. Hubbard, President of the Senate:

Your committee on "Privileges and Elections," to whom was referred the memorial of Seth Shepard, claiming to be elected Senator from the Sixteenth Senatorial District, and the certificate of election issued to Matthew Gaines, as Senator from said district, would respectfully submit the following report:

The charges in said memorial were that said Matthew Gaines, who held the certificate of election, was and is ineligible to the office; that the facts of his ineligibility were public and notorious among the voters of the said Sixteenth Senatorial District.

It was proven to the satisfaction of your committee, that Matthew Gaines was convicted of the crime of *bigamy* in the District Court of Fayette county, on the 15th day of July, A. D. 1873, and his punishment assessed at one year's confinement in the State penitentiary; and it appears from the statement of facts of record in his case that the verdict of the jury was correct. It appears also in proof that said Gaines had applied for a transfer of said case to the U. S. District Court, sitting at Austin, which application was overruled.

The late Supreme Court, on the....day of November, 1873, reversed the judgment of the court below, holding that the court erred in refusing the transfer—the cause was not reversed on its merits. Such a doctrine as that contained in the opinion of the Supreme Court, would permit every criminal in the land, who would make the necessary oath, to go unwhipped of justice.

It further appears in proof that the District Court, on

granting the appeal, remanded the prisoner to jail to await the further order of the court; and the judgment of the Supreme Court, was, that the case be reversed and remanded for further proceedings in accordance with the opinion of the Supreme Court.

It also appears that there has been no session of the District Court of Fayette county since the decision of the Supreme Court was rendered. It seems too that Matthew Gaines, the prisoner, is now at large, but how or in what manner, he released himself from his confinement in jail has not been made known to your committee.

Article six (6), Section one (1) of the constitution defines the qualifications of electors; it reads as follows: "Every male citizen of the United States, of the age of twenty-one years and upwards, not laboring under disabilities named in this constitution, without distinction of race, color or former condition, who shall be a resident of this State at the time of the adoption of this constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote, sixty days next preceding any election, shall be entitled to vote for all officers that are now, or hereafter may be elected by the people, and upon all questions submitted to the electors at any election; *provided*, that no person shall be allowed to vote, or hold office, who is now, or hereafter may be disqualified therefor, by the constitution of the United States, until such disqualification shall be removed by the Congress of the United States; *provided, further*, that no person, while kept in any asylum or confined in prison, or who has been convicted of a *felony*, or who is of unsound mind, shall be allowed to vote or hold office."

Your committee are of the opinion that Matthew Gaines is ineligible to the office of Senator on two of the grounds contained in the last provision of the above quoted article of the constitution: First, he has been convicted of a felony. Second, he was legally confined in prison on the day of the election, to-wit, the 17th day of February, 1874.

First, your committee believe that the word "*convicted*" used in the constitution is to be taken in its usual and ordinary meaning, such as it has in the estimation of the people in general, for whom constitutions are made, and not in any technical sense, which it may convey to the minds of that class of men only who are "learned in the law." The following definition of the word "*conviction*"

is given by an able writer upon criminal law, in these words: "*Conviction*"—this word ordinarily signifies the finding of a prisoner guilty by the verdict of a jury. When it is said that there has been a conviction or that one is a convict, the meaning is not usually that sentence has been pronounced, but that the verdict has been rendered. (1 Bishop on Criminal Law, 4th Edition, Section 363; See also 4th Blackstone's Com's. 362.)

We have given the word "*convicted*" its usual and ordinary meaning in accordance with the rules of the constitution laid down in the best authorities. Judge Cooley in his work on Constitutional Limitation, says (page 58), "in interpreting clauses, we must presume that *words have been employed in their natural* and ordinary meaning."

In the leading case of Gibbons v. Ogden, 9th Wheaton, 188, Chief Justice Marshall said: "The framers of the constitution and the people who adopted it, must be understood to have employed words in their natural sense and to have understood what they meant."

The reasons for this rule of construction are given by Judge Story in his work on the Constitution, volume 1st, sec. 451, as follows: "In the first place then, every word employed in the constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, designed for common use and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in theory meaning, or any extraordinary gloss."

To the same effect see Sedgwick on Statutory and Constitutional Law; Cooley on Constitutional Limitations, 83d note.

There is nothing in the clause of the constitution, which we have quoted to indicate that its framers meant to use the word "*convicted*" in any other than its usual and ordinary sense; it was made for the benefit of, and was intended to be understood by the great mass of voters, who are not versed in the subtle technicalities of the law.

The intention of this restriction was evidently intended to preserve that purity in legislation upon which the weal of a State depends. A people, jealous as ours have ever been, of their national honor, would have the representatives of their sovereignty above even the suspicion of a crime.

The power given in all of our American constitutions, to each branch of the legislative department of the government, to judge of the election and qualifications of its own members, arises out of this fact.

The House of Representatives of the Forty-first Congress of the United States expelled *C. C. Bowen*, a member from South Carolina, because he had been convicted of *bigamy*, and on re-election he was declared ineligible, although he had been pardoned by the President.

Second. Your committee are also of the opinion that Matthew Gaines is ineligible to a seat in this Senate on the second ground—where a defendant appeals from a conviction of *felony* the statute requires that he be remanded to the county jail, pending the appeal. (Paschal's Digest, Art. 3185.)

It appears from the judgment of the District Court of Fayette county, that the convict Matthew Gaines was ordered to jail to await the further proceedings of said court.

Upon a reversal of a judgment of the District Court, the Supreme Court may wholly dismiss the case and discharge the appellant; or it may remand for further proceedings to be had in said court (Paschal's Digest, Art. 3228), and the Supreme Court in this case remanded for further proceedings in accordance with their opinion, and such other proceedings under the act of Congress, providing for removals to the United States courts, are the giving of recognizances to appear in the United States Court, which facts should appear on the minutes of the State court. There has been no session of the Fayette District Court since said judgment of the Supreme Court, and the said Gaines, was on the date of the election, in contemplation of law at least and is now, in the jail of Fayette county. "That which the law requires to be done is considered as done." The said Gaines though now it seems at large, is in the attitude of an escaped prisoner and liable to arrest at any moment. The sheriff had no right to admit to bail (if such he has done), because it was in violation of the judgment of the court, and the district judge had no right to order his dis-

charge, because out of term time he has no more power over the liberty of a prisoner than any other citizen possesses.

The only two means known to the law by which a district judge can discharge or release a prisoner from confinement in prison, are by judgment duly entered in term time or by order made in proceedings by *habeas corpus*.

In this case it does not appear by what means the prisoner effected his release, and though duly served with process and with notice of the time of the sessions of the committee, he has failed to appear.

This cause of disqualification is peculiar in our constitution, and the reason for it would seem to lie in this, that certain offices being necessary in the due administration of government, they should be filled and their duties regularly performed, and persons being in arrest or liable, as in this case, to immediate seizure at any time and place, could not with certainty perform these duties, and an *interregnum* would be likely at any moment to ensue.

Third. Satisfactory proof has been made to your committee, by certified copies of the returns of election, that, according to the official count, there were cast on the seventeenth day of February, 1874, in the Sixteenth Senatorial District, for *Matthew Gaines*, 1597 votes; for Seth Shepard, 1561 votes; for C. B. Francis, 163 votes; and for J. B. Gibson, 12 votes; Ben Long, 1 vote; and R. S. Simpson, 1 vote. Your committee, believing that said Gaines was ineligible to office on said day of election, are of the opinion that the record of his conviction was constructive notice of the fact to all voters; yet your committee has also had satisfactory proof made to them that the fact of ineligibility was notorious throughout the county of Washington among the persons who voted for said Gaines; and it is also in proof that some days prior to said election, at a convention held in Brenham, Washington county, which placed the said Gaines in nomination, two members of said convention gave notice to the others that Gaines was not eligible to office, because of the facts above stated, and warned the convention to put another candidate in the field, who could take his seat if elected.

Your committee, after a careful review of all the accessible authorities upon the question, are of the opinion that the votes cast for *Matthew Gaines* should not be counted, and that Seth Shepard, having received the highest num-

ber of votes cast for any eligible person, was legally elected, and is now entitled to his seat as Senator from the Sixteenth Senatorial District.

It is a well settled rule of law that if voters had actual or constructive legal notice of the ineligibility of a candidate, at or before the time of voting; then in attempting to vote for him they deliberately throw their votes away as much as if they were to vote for a dead man, or for two names for one office, or to cast a blank ballot.

The reason of the rule is plain; if an election is only rendered void by the ineligibility of the majority candidate, when this fact is notorious, then it would be in the power of a majority to keep an office vacant for an indefinite period of time, thus interfering with good government; and what is true of one office is true of another, though it may be highest in the gift of the people.

A learned judge has said, in delivering an opinion in a case directly in point (Gulick v. New, 14th Indiana, p. 97), we are reminded (in argument by counsel) "that in our form of government that the majority should rule, and that if the course indicated is not followed a majority of the voters may be disfranchised, their voice disregarded, and their rights trampled under foot, and the choice of a minority listened to. True, by the Constitution and laws of this State, the voice of a majority controls our elections, but that voice must be constitutionally and legally expressed. Even a majority should not nullify a provision of the constitution, or be permitted at will to disregard the law. In this is the strength and beauty of our institutions. Suppose a majority should persist in voting for a man totally ineligible to take the office of sheriff, what would be the result? As he could not hold the office, either the one capable of holding, receiving the next highest vote, would, as contended by the appellant, be entitled to the office, or there would be a vacancy, as insisted by the appellee. Suppose the proceedings should result in creating a vacancy, then it would remain greatly to the detriment of public and private interests. Then, whilst it is true that the votes of a majority should rule, the tenable ground appears to be that if the majority should vote for one wholly incapable of taking the office, having notice of such incapacity, or should perversely refuse, or negligently fail to express their choice, those, although a minority, who should legitimately choose one eligible to the position,

should be heeded. Suppose that, eight years ago, at the first election held under our new constitution, when nearly all the offices in the State were to be filled, a majority of the voters in the State, and in the several districts and counties, had voted for persons wholly ineligible to fill the several offices, would those offices thereby have remained vacant? Could that majority by persevering in that course have continued the anarchy that might have resulted from such action? Or, rather, is not the true theory that those who act in accordance with the constitution and the law should control even a majority who may fail to so act?

In considering this question, it must be remembered that according to the law and practice that prevails in Texas and most of the States, it is not necessary that a candidate to be elected should receive a majority of the votes, but that he should receive more than any other candidate. This doctrine is illustrated in a peculiar case adjudicated in Pennsylvania. (See Commonwealth v. Reed, 2d Ashmead, 261.) The case was this: under the law of the State the county board were required to elect a county treasurer; the board numbered twenty, and eleven constituted a quorum. The board met to elect and a quorum was present. The general election law of the State required all elections to be by ballot; but the board holding that the law did not apply to such elections as this resolved to vote *viva voce*, save one person who insisted that the other method was illegal; his ballot was rejected. In a suit for the office, it was held by the court that all the *viva voce* votes were illegal and null, and it declared the candidates for whom the ballot was given to have been duly elected.

This case is also reported in Brightly's election cases, page 129, and its ruling has been followed in Missouri.

In England the rule has always prevailed, that votes cast with notice of ineligibility of the candidate are null, and will not be counted as cast at all. The doctrine is thus expressed in an English case, quoted approvingly by Grant in his work on corporations, pages 205-6 and 7, "where an elector, before voting, receives notice that a particular candidate is disqualified and yet will do nothing but tender for him, he must be taken voluntarily to abstain from exercising his franchise; and, therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate; for

he will not take the only course by which it can be resisted, that is, by helping to the election of some other person. He is present as an elector; but he attends only as an elector to perform the duty which is cast on him by the franchise he enjoys as an elector; he can speak only in a particular language; he can only do certain acts; any other language means nothing; any other act is merely null; his duty is to assist in making an election.

If he dissents from the choice of "A," who is qualified, he must say so by voting for some other that is also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend the elective assembly of the corporation. And this is a wise and just rule in the laws. It is necessary that an election should be duly made and at the lawful time; the electoral meeting is held for that purpose only, and but for this rule the interest of the public and the purpose of the meeting might both be defeated by the perverseness or the corruption of electors who may seek some unfair advantage by postponement.

If the elector will not oppose the election of "A" in the only legal way, he throws away his vote by directing it where it has no legal force; and in so doing, he voluntarily leaves unopposed, that is, assents to the voices of the other electors."

(Gosling v. Fesey, 7 2 B., 437; Rex v. Hawkins, 10 East., 352; 2d Don., 124; Taylor v. Mayor of Bath, Comp., 537; Rex v. Courtnay, 9 East., 261; Rex v. Parry, 14 East., 459; Claridge v. Evelyn, 5 B. & A., 86; R. v. Mayor and C. F. Wistlove, 3 B. & C., 686; 3 Luder's election cases, 324; note 11; 1 Willcock on Corp., 11–12.)

The English rule has been adopted in America and is regarded as well settled. (Cushing's Lex Parl, Sections 175–9. Gulick v. New, 14 Indiana, 93–102; Carson v. McPhetredge, 15 Ind., 327; People v. Clute, Decd. sup. ct. of New York, June, 1872.) See American Law Times and Reports, Vol. 5, Nos. 9–10.

There are some American cases opposed to the doctrine: one in California and two in Wisconsin. These cases were decided upon other points and are mere *obeitee dicta*.

They are carefully reviewed and expressly overruled in the case of Gulick v. New, 14 Indiana, 102.

Judge Perkins, who delivered a concurring opinion in

this case, (p. 102) thus states the law: "Where the voters at an election do know, or are legally bound to know, so that in law they are held to know, of the ineligibility of a candidate, the election does not result in a failure; but, in such case, the eligible candidate receiving the highest number of votes, is legally elected and entitled to the office."

The case is also forcibly stated by Hanna, J. for the court, in the same case, (p. 100.) We are of the opinion, that so far as the pleadings in this case show, the voters of Marion county had sufficient notice of the fact, that Wallace had been elected to a judicial office and had taken upon himself the duties thereof, the term of which had not expired at the time an attempt was made to confer upon him the office of sheriff. The votes then given, or attempted to be cast for him for that office, were ineffectual for any purpose. They had no more effect in a legal point of view, than if they had been cast for a dead man, or for one who never had a being.

The only American case taking a contrary view of the law in deciding directly upon the point, is that of the Commonwealth v. Cluley, 56 Pennsylvania, 270, and reported also in Brightley's election cases. But the court was divided, and C. J. Thompson delivered a strong dissenting opinion.

The opinion of the majority is given by Judge Strong, who does not cite a single authority, and a sentence occuring on page 273, as follows: "We are not informed that there has been a decision strictly judicial upon the subject," destroys the authority of his opinion.

The very latest case upon this question is that of People v. Clute, heretofore cited in support of the view taken by the committee. The case was this: Clute and Furman were candidates for the office of Superintendent of the Poor for Schenectady county. Clute received 2448 votes and Furman 2228. Clute's majority was 220. At the time of the election Clute was supervisor of the Fifth Ward of the city of Schenectady, and there was a statute declaring supervisors ineligible to the office of superintendent. Clute received 295 votes in the Fifth Ward. The court, after a careful review of the authorities, held that the voters of the Fifth Ward were bound in law to take notice of Clute's ineligibility, and the 295 votes cast in said ward were declared null and void and thrown out, and Furman was declared duly elected.

Your committee are of the opinion that Matthew Gaines was ineligible to office on the seventeenth day of February, 1874; that his ineligibility was known to the persons voting for him; that said votes should not be counted; and that Seth Shepard, having received more votes than any eligible candidate, was elected Senator, and is entitled to be sworn and seated.

We respectfully recommend the adoption of the accompanying resolutions:

First—*Resolved*, That Matthew Gaines is ineligible to the position of Senator from the Sixteenth Senatorial District, because of his conviction of the crime of bigamy, it being a felony under the law of the State of Texas, which renders him infamous; and secondly, because he was, in contemplation of law, legally confined to jail at the date of his election. Adopted.

Second—*Resolved*, That Seth Shepard, having received the highest number of votes cast for a qualified candidate at the special election for State Senator in the Sixteenth Senatorial District, held on the nineteenth day of February, 1874, is entitled to the position of Senator from said District, and is entitled to be qualified and seated as such immediately.

A message was received from the House announcing that the House was now ready to receive the Senate in joint session, for the purpose of further hearing and considering the causes set forth in the address against Judge L. W. Cooper, of the Third Judicial District.

Pending the reading of the report of the Committee on Privileges and Elections, on motion of Senator Ireland, the Senate proceeded to the House.

IN JOINT SESSION.

Captain D. A. Nunn resumed his argument.

At the expiration of the time allowed, on motion of Mr. DeMorse, of the House, he was allowed an extension of thirty minutes.

At the close of his remarks, on motion of Mr. Triplett, of the House, Judge Cooper was allowed to make an explanation in regard to some documentary evidence presented by Captain Nunn, from the State of Georgia.

Mr. Rainey, of the session, asked permission to make an explanation in regard to said papers. Leave granted.

On motion of Mr. Denman, he was allowed to make an

explanation in regard to some testimony given by him in the committee room, on this case.

Senator Westfall moved that Col. L. J. Word, for the defense, be allowed thirty minutes to reply, inasmuch as the same length of time had been allowed the prosecution.

Mr. Storey, of the House, moved to amend the motion offered by Senator Westfall, by allowing the counsel for the prosecution ten minutes to reply to the argument to be made by the defense, under the motion made by Senator Westfall.

The amendment offered by Mr. Storey was adopted.

The motion made by Senator Westfall was then adopted.

Col. L. J. Word then addressed the joint session, in behalf of the respondent.

At the close of his remarks, Capt. D. A. Nunn then addressed the joint session in behalf of the State.

On motion of Senator Stirman, the Senators retired to the Senate Chamber.

IN SENATE.

Senator Ireland moved that the Senate do now proceed to vote on the causes set forth in the address against Judge L. W. Cooper, of the Third Judicial District.

Senator Russell moved that Senator Camp be excused for the day.

Senator Dillard moved a call of the Senate. Call sustained. Absent—Senator Camp.

Senator Ireland withdrew his motion. Senator Dillard moved a suspension of the call. Carried.

On motion of Senator Dillard, the vote on the address of Judge L. W. Cooper was postponed until 10 o'clock A. M. to-morrow.

The Secretary then read the remainder of the report from the Committee on Privileges and Elections.

Senator Flanagan presented a memorial from C. B. Francis, of Washington county, claiming that he was legally entitled to be seated as Senator from the Sixteenth Senatorial District. Read and referred to Committee on Privileges and Elections.

On motion of Senator Ireland, the rules were suspended to take up the report submitted by the Committee on Privileges and Elections.

On motion of Senator Ireland, the question was divided, and the first resolution was considered.

The resolution was adopted.

Senator Dillard moved that the remaining resolution lay over for action until 10 o'clock A. M. to-morrow.

The President submitted the question to the Senate whether, at this stage of proceeding of the case, they would postpone its further consideration.

The Senate voted that it be postponed.

On motion of Senator Westfall, the rules were suspended, to take up House Bill, No. 151, "An Act making appropriation to pay costs due sheriffs, clerks, and attorneys, in felony cases in District courts, for 1873, and previous years; to pay the fees of justices of the peace, and other peace officers in criminal prosecutions for 1872, and previous years; and to pay justices of the peace assessing the taxes for 1873."

Senator Westfall offered the following amendment:

"Add to end of Section 1 the words: *provided*, that all claims for services rendered prior to January 15, 1874, shall be paid out of money arising from the sale of bonds, as provided by an an Act entitled 'An Act to authorize the Governor to sell certain bonds of the State to settle the indebtedness of the State with Williams & Guion," approved March 4, 1874."

Adopted.

The bill was then read the third time, and passed by the following vote:

YEAS—Senators Ball, Bradshaw, Bradley, Burton, Davenport, Dwyer, Ellis, Erath, Friend, Hobby, Ireland, Joseph, Ledbetter, Morris, Parker, Russell, Stirman and Westfall—18.

NAYS—Senators Baker, Dillard, Moore and Swift—4.

Senator Ball introduced a bill entitled "An Act to create the office of Assistant Attorney General, and prescribing the duties and salary thereof." Read and referred to Juciary Committee.

Senator Swift introduced a bill entitled "An Act to authorize the Commissioner of the General Land Office to issue patents to certain leagues of land, located in San Augustine county, and other counties in the State, between the thirteenth day of November and the first day of December, 1835, and to validate the same." Read and referred to Committee on Private Land Claims.

Senator Westfall introduced a Joint Resolution "to pay the Travis Rifles for services rendered."

Read first time, and on motion of Senator Dillard, the rules were suspended, and Joint Resolution read second time.

Senator Friend offered the following amendment:

"At the end of Section 1, add the words: *provided*, that only those members who were personally present and acting as special sergeants-at-arms, shall be entitled to draw the pay above provided for."

Senator Parker moved to postpone the Joint Resolution to 10 o'clock A. M. to-morrow.

On motion of Senator Swift, the Senate adjourned.

SIXTIETH DAY.

SENATE CHAMBER,
Austin, March 26, 1874.

Senate met pursuant to adjournment. Roll called; quorum present.

Prayer by the chaplain.

Journal of yesterday read and adopted.

On motion of Senator Stirman, Senator Allison was excused for to-day.

On motion of Senator Westfall, Senator Davenport was granted leave of absence for one week from to-morrow.

On motion of Senator Dillard, the Secretary of the Senate was excused to-morrow on account of sickness.

Senator Dwyer presented the following vote of thanks from the Irish-American Association:

IRISH-AMERICAN ASSOCIATION,
San Antonio, March 21, 1874.

Be it resolved, That a vote of thanks be and the same is hereby tendered to the Senate of the State of Texas, for their kind consideration in the adjournment of their honorable body on the seventeenth of March, 1874, in honor of the Apostle of Ireland.

Attest: JAMES MCSORLEY,
Corresponding Secretary.

Senator Bradley, for Committee on Privileges and Elections, submitted the following report: